DEPARTMENT OF JUSTICE
Antitrust Division

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The Honorable Michael K. Powell
Chairman
Federal Communications Commission
Washington, D.C. 20554

Re: In the Matter of 2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Service, WT Docket No. 01-14

Dear Chairman Powell:

In a Notice of Proposed Rule Making ("NPRM"), released January 23, 2001, the Federal Communications Commission sought comments on its policies regarding the aggregation of Commercial Mobile Radio Services ("CMRS") spectrum, namely the CMRS spectrum cap and the cellular cross-interest rule. The Commission's purpose in evaluating these policies is a desire to promote and protect competition in CMRS markets.

The United States Department of Justice ("Department") is one of the federal agencies responsible for enforcing the antitrust laws and promoting competition, and has participated in prior Commission proceedings involving the role of competition in telecommunications. The Department has evaluated numerous transactions involving CMRS license transfers. Several investigations have resulted in Complaints and consensual Final Judgments requiring divestitures to preserve competition.

Regardless of the outcome of this proceeding, the Department will continue to review, on a case-by-case basis, mergers in the wireless industry to determine if they will have anticompetitive consequences in violation of Section 7 of the Clayton Act. The Department submits these comments to assure the Commission that the Department will continue to safeguard competition through its enforcement activities in the industry, and does not believe removal of the spectrum cap rules will diminish its ability to do so.

1. The Department's Role

The Department evaluates mergers under Section 7 of the Clayton Act which prohibits acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." The Department analyzes wireless mergers essentially the same way it does transactions in other industries, as explained in the Horizontal Merger Guidelines jointly issued by the Department of Justice and Federal Trade Commission. The Department's legal role is fundamentally one of enforcement, on a case-by-case basis, rather than an exercise in prospective rule-making. The Department investigates mergers only after they are proposed, and examines the specific circumstances surrounding each transaction.

II. The Department's Wireless Cases

Over the past three years, the Department has brought four Clayton Act Section 7 cases that implicate wireless markets,[1] all of which were resolved by consensual Final Judgments. In each case, the merging parties had ownership interests in mobile wireless business that competed in numerous local markets and the consent decree required that one of the two competing businesses be divested to a third party acceptable to the Department.[2]

In its investigations of mergers of mobile wireless carriers, the Department defined wireless mobile telephone services as a relevant product market. Because markets are dynamic, so are definitions of antitrust product markets. Increasingly, the owners of the CMRS spectrum are using it to provide mobile data services, such as Internet access, instant messaging, and e-mail, in addition to mobile voice offerings. Whether the delivery of these mobile data services necessitates modifications to product market definitions, or consideration of competitive effects in markets other than a single wireless mobile telephone market, may well be important questions in the future.

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[1] United States v. SBC Communications Inc. and BellSouth Corporation, No. 1:00CV02073 (PLF) (D.D.C.); United States v. Bell Atlantic Corporation, GTE Corporation and Vodafone AirTouch Plc, No. 1:99CV01119 (EGS) (D.D.C); United States v. SBC Communications Inc. and Ameritech Corporation, No. 1:99CV00715 (TPJ) (D.D.C.); United States v. AT&T Corp. and Tele-Communications, Inc., No. 1:CV03170 (EGS) (D.D.C.).

[2] In three of the four cases, the divestitures were of numerous local wireless businesses. United States v. AT&T Corp. and Telecommunications, Inc. presented a slightly different situation. There, AT&T, a major provider of mobile wireless telephone services was purchasing Tele-Communications, which owned a 23.5% equity interest in the mobile wireless telephone business of Sprint PCS, another major provider of mobile wireless services in markets throughout the nation. By acquiring the partial ownership in Sprint, AT&T's incentives to compete against Sprint PCS would be reduced. Thus, the Department required the defendants to completely divest their Sprint PCS stock.

To date, the Department's view has been that relevant geographic markets for mobile wireless services are fundamentally local because the only viable choices for a consumer are those wireless firms that have a license for, and offer services in, their local region. The Department has identified as relevant geographic markets the local areas in which the competing firms each own licenses. Whether there might also be other larger or smaller markets for mobile wireless services, for instance a national market for large customers who seek a carrier with a presence throughout the United States, is an issue the Department has not yet considered.

The Department's competitive effects analysis has included consideration of the number of competitors in each market, the current shares, the possibility of entry, the amount of spectrum held by each competitor, and the likely future development of the market. Until recently, most local mobile wireless markets were dominated by two cellular carriers. As the Commission recognizes, over the past several years, new entry (particularly from PCS licensees) has begun to erode the market shares of the cellular firms. This has brought the benefits of competition to consumers including falling prices and improved service quality and features. At the time of the Department's wireless investigations, because the market shares of the cellular firms were very high in most markets, and because in many markets the number of actual active competitors was still relatively small (in large part because many PCS licensees had not yet entered the market), the Department was concerned about mergers that would eliminate an active, or soon to be active, competitor in local mobile wireless markets. The Department filed cases that alleged a harm to competition in numerous local markets, and resolved those cases by consent decrees that required the divestiture of one of the overlapping businesses.

Although the Department viewed the amount of spectrum controlled by each firm as relevant -- since a firm cannot enter without spectrum -- it was not decisive in the analysis. In many cases, firms with spectrum had not begun the time-consuming and expensive process of building out a network and thus, entry would be unlikely in the next few years to discipline a price increase or other anticompetitive effect from the merger. In addition, because spectrum could be employed for other uses besides mobile wireless services (e.g., fixed wireless services), it was not always clear that the spectrum would be used to enter the relevant market. Thus, the Department's competitive analysis focused more on the number of active, or soon to be active, wireless competitors and their respective shares as measured by number of subscribers, rather than on spectrum.[3]

[3] There are many ways to measure current market share, including subscribers, minutes of use, or revenues. The most accurate or appropriate measure depends upon the particular circumstances. Moreover, although market shares are relevant, they do not always convey the entire competitive picture. For instance, current market shares may understate the competitive significance of PCS providers because they are typically recent entrants who have only just begun to take share away from the cellular incumbents.

The Final Judgments agreed to by the Department sought to preserve the pre-merger market structure by requiring divestiture of one of the wireless businesses in each of the overlapping markets. As with divestiture consent decrees in other industries, a major consideration was ensuring that the divested business would be a viable and effective competitor in the hands of a new buyer.

Given the nature of the Department's analysis, no conclusions have been reached about the "ideal" number of competitors in a market or the maximum amount of spectrum a firm can be permitted to own. Nevertheless, spectrum limits do, undoubtedly, affect the competitive structure of a market because spectrum is an essential input to providing wireless services and its amount is limited.[4]

III. The Department's View of Competition in the Wireless Industry

Recent years have seen a dramatic increase of competition in the mobile wireless industry, particularly as PCS firms have entered markets around the country. Consumers have benefitted dramatically thus far from falling prices and enhanced services. Particular mergers may still, in some circumstances, be anticompetitive -- especially ones between two cellular carriers with still dominant shares -- but the Department reviews such transactions in order to ensure that Section 7 of the Clayton Act is not violated.[5]

In the NPRM, the Commission seeks comment about the link between economic competition in CMRS markets and retention of the spectrum cap, and asks "[i]f meaningful competition between providers of telecommunications services now exists, have spectrum aggregation limits served their purpose and are they no longer in the public interest?"[6]

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[4] More detailed explanations of the Department's rationale for these cases is contained in the Competitive Impact Statement filed in each of the four wireless matters.

[5] Most wireless mergers must be filed with the Department under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. §18a (2001). The Department routinely screens these filings and opens investigations in instances where there are significant competitive questions. Under recent amendments, a significant number of transactions may not be reportable due to their small size. Section 630 Pub. L. No. 114 Stat. 2762, codified at 15 U.S.C. §18a(a) (2001) (raising the filing threshold to $50 million). Although the Department might still investigate non-reportable transactions that raise competitive concerns, and bring a Complaint in appropriate circumstances, it is possible that some smaller, potentially problematic transactions could be completed without the Department ever becoming aware of them. The Commission may want to consider this in its rulemaking proceeding and subsequent license transfer processes.

[6] NPRM, para. 12

The Department notes that the emergence of a competitive market structure does not, in itself, eliminate the need for vigilance to retain that competitive market structure. Indeed, the Department's role in enforcing Section 7 of the Clayton Act is designed to prevent transactions that would make the market less competitive. The Department does not, however, view the CMRS spectrum cap as a proxy for more appropriate case-specific evaluation. The rigid application of prospective rules, even as a complement to the Department's enforcement efforts, may have the unwanted effect of blocking efficient transactions. Elimination of the rules may have the positive benefit of enabling the development of new and improved services to consumers.

Regardless of the Commission's ultimate determination in this proceeding, the Department will continue to exercise its enforcement responsibilities and analyze the competitive implications of mergers and acquisitions in the wireless industry.[7] Removal of the spectrum cap would not, in the Department's view, impair its efforts to protect competitive markets in this industry.

Sincerely,

Charles A. James

cc: The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
Thomas J. Sugrue, Chief, Wireless
Telecommunications Bureau

[7] With regard to initial license issuance, as opposed to license transfers the Commission should recognize that it is likely that its prospective rules, including any auction rules, may be the primary policy tool in shaping the initial competitive landscape created by the auctioning of the new spectrum.